FILED
MAR 6 2015
OFFICE OF THE CLERK

Nos. 14-556, -562, -571, -574

IN THE

Supreme Court of the United States

JAMES OBERGEFELL, ET AL.,

Petitioners,

v.

RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR KRISTIN M. PERRY, SANDRA B. STIER, PAUL T. KATAMI, JEFFREY J. ZARRILLO, TIMOTHY B. BOSTIC, TONY C. LONDON, CAROL SCHALL, AND MARY TOWNLEY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

DAVID BOIES
JOSHUA I. SCHILLER
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, NY 10504
(914) 749-8200

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
AMIR C. TAYRANI
CHANTALE FIEBIG
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
tolson@gibsondunn.com

Counsel for Amici Curiae

[Caption and additional counsel continued]

VALERIA TANCO, ET AL.,

Petitioners,

v.

WILLIAM EDWARD "BILL" HASLAM, GOVERNOR OF TENNESSEE, ET AL.,

Respondents.

APRIL DEBOER, ET AL.,

Petitioners,

v.

RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL.,

Respondents.

GREGORY BOURKE, ET AL.,

Petitioners,

v.

STEVE BESHEAR, GOVERNOR OF KENTUCKY, ET AL.,

Respondents.

THEODORE J. BOUTROUS, JR.
THEANE EVANGELIS
ENRIQUE A. MONAGAS
ABBEY HUDSON
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7726

THOMAS B. SHUTTLEWORTH
ROBERT E. RULOFF
CHARLES B. LUSTIG
ANDREW M. HENDRICK
ERIK C. PORCARO
SHUTTLEWORTH, RULOFF, SWAIN, HADDAD & MORECOCK, P.C.
317 30th Street
Virginia Beach, VA 23451
(757) 671-6000

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE RIGHT TO MARRY IS FUNDAMENTAL FOR ALL AMERICANS 4

II. THE *PERRY V. SCHWARZENEGGER* TRIAL RECORD CONFIRMS THAT GAY MEN AND LESBIANS SEEK ACCESS TO THE SAME FUNDAMENTAL RIGHT TO MARRY THAT THIS COURT HAS LONG RECOGNIZED 8

III. MARRIAGE IS DIFFERENT: PERSPECTIVES FROM THE *PERRY* AND *BOSTIC* PLAINTIFFS 16

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

CASES

Baskin v. Bogan,
766 F.3d 648 (7th Cir. 2014) 7

Bishop v. Smith,
760 F.3d 1070 (10th Cir. 2014).....8

Bishop v. United States ex rel. Holder,
962 F. Supp. 2d 1252 (N.D. Okla. 2014) 15

Boddie v. Connecticut,
401 U.S. 371 (1971).....5

Bostic v. Rainey,
970 F Supp. 2d 456 (E.D. Va. 2014).....15

Bostic v. Schaefer,
760 F.3d 352 (4th Cir. 2014) 1, 7

Carey v. Population Servs. Int'l,
431 U.S. 678 (1977).....5, 6

Cleveland Bd. of Educ. v. LaFleur,
414 U.S. 632 (1974).....3, 4

De Leon v. Perry,
975 F. Supp. 2d 632 (W.D. Tex. 2014) 15

Eisenstadt v. Baird,
405 U.S. 438 (1972).....6

Geiger v. Kitzhaber,
994 F. Supp. 2d 1128 (D. Or. 2014).....15

Griswold v. Connecticut,
381 U.S. 479 (1965).....5, 6

Hollingsworth v. Perry,
133 S. Ct. 2652 (2013).....1, 17

Kitchen v. Herbert,
755 F.3d 1193 (10th Cir. 2014).....8

Latta v. Otter,
771 F.3d 456 (9th Cir. 2014) 7, 15

Lawrence v. Texas,
539 U.S. 558 (2003).....5, 7

Loving v. Virginia,
388 U.S. 1 (1967).....3, 4

M.L.B. v. S.L.J.,
519 U.S. 102 (1996).....3, 5

In re Marriage Cases,
183 P.3d 384 (Cal. 2008).....17

Maynard v. Hill,
125 U.S. 190 (1888).....5

Meyer v. Nebraska,
262 U.S. 390 (1923).....5

Moore v. City of East Cleveland,
431 U.S. 494 (1977).....5

Perry v. Schwarzenegger,
704 F. Supp. 2d 921 (N.D. Cal. 2010) .....*passim*

Planned Parenthood of Se. Pa. v. Casey,
505 U.S. 833 (1992).....5

Roe v. Wade,
410 U.S. 113 (1973).....5

Skinner v. Oklahoma ex rel. Williamson,
316 U.S. 535 (1942).....5

Turner v. Safley,
482 U.S. 78 (1987).....5, 6, 7

United States v. Virginia,
518 U.S. 515 (1996).....3

United States v. Windsor,
133 S. Ct. 2675 (2013).....3, 4, 7, 26

Wolf v. Walker,
986 F Supp. 2d 982 (W.D. Wis. 2014) 15

Zablocki v. Redhail,
434 U.S. 374 (1978).....2, 5, 6

OTHER AUTHORITIES

David Blankenhorn,
How My View on Gay Marriage Changed,
N.Y. Times (June 22, 2012) 10

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are four couples who successfully challenged state laws prohibiting marriage between individuals of the same sex. Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo successfully challenged California's prohibition in the case that culminated in this Court's decision in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). Timothy B. Bostic, Tony C. London, Carol Schall, and Mary Townley successfully challenged Virginia's prohibition in *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir.), *cert. denied*, 135 S. Ct. 286, 135 S. Ct. 308, 135 S. Ct. 314 (2014).

In light of their role as plaintiffs in prior marriage-equality litigation, *amici* have a significant interest in the outcome of this case and, in particular, in extending the same fundamental right to marry that *amici* now enjoy to gay men and lesbians in all 50 States. For years, *amici* shouldered the legal inequalities and social indignities of second-class citizenship. Having now experienced the manifold benefits of marriage, *amici* have a deep interest in seeing the right of gay men

---

[1] In accordance with Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person or entity, other than *amici curiae* and their counsel, made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief. Respondents consented via blanket consent letters filed with the Court, while petitioners provided *amici curiae* with a letter of consent.

and lesbians to marry recognized in all States, which will ensure that *amici*'s right to marry will never again be called into question by a state law or referendum, enable *amici* to travel or move to other States without jeopardizing the recognition of their marriages, and vindicate the fundamental right to marry of countless other gay and lesbian Americans. Further, *amici* Perry, Stier, Schall, and Townley have witnessed the salutary effects that their marriages—and marriage equality generally—have had on their children. *Amici* are committed to preserving these benefits and extending them to the children and families of gay men and lesbians throughout the United States.

SUMMARY OF ARGUMENT

Amici have experienced both the joys of marriage, and the pain of being denied this "most important relation in life." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (internal quotation marks omitted). The former is unquestionably better—better for the individuals in the marriage, their children, their extended families, their neighbors, and their communities. The Court should hold that *all* Americans, including gay men and lesbians, enjoy the fundamental right to enter into this profoundly important and deeply meaningful relationship so that petitioners—and gay men and lesbians across the country—can experience the same dignity, love, respect, safety, responsibility, benefits, and certainty that *amici* can now attest accompany full marriage equality.

This Court has held more than a dozen times that the right to marry is "one of the liberties

protected by the Due Process Clause." *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (1974). It is "essential to the orderly pursuit of happiness by free men," *Loving v. Virginia*, 388 U.S. 1, 12 (1967), and "sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996).

Marriage between individuals of the same sex shares each of these legal and practical attributes. The extensive factual record developed during the twelve-day trial in *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010)—as well as the life experiences of *amici*—demonstrate that gay men and lesbians seek to exercise the same fundamental right to marry that heterosexuals have always enjoyed.

Respondents nevertheless ask this Court to ignore the States' entrenched discrimination against gay men and lesbians, and leave this fundamental right to the whims of the electorate and lawmakers. That position is fundamentally at odds with the history of our Constitution, which "is the story of the extension of constitutional rights and protections to people once ignored or excluded." *United States v. Virginia*, 518 U.S. 515, 557 (1996). Upholding the discriminatory marriage laws at issue here would relegate same-sex couples to the "unstable position of being in a second-tier marriage," *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013)—one recognized only as long as voters and legislators see fit—or worse still, deny them the right to marry altogether. As this Court recently confirmed, such a "differentiation" between same-sex couples and opposite-sex couples "demeans the couple" in the

same-sex relationship, "whose moral and sexual choices the Constitution protects[,] . . . [a]nd it humiliates tens of thousands of children now being raised by same-sex couples." *Id.*

Windsor's bleak picture of a "second-tier marriage" stands in sharp contrast to the personal experiences of *amici* in the wake of federal court decisions striking down California's and Virginia's bans on same-sex marriage. *Amici* and their families now enjoy all the benefits and burdens of marriage—stability, mutual responsibility, and dignity—and their experiences confirm a self-evident truth: marriage is a singular institution that uniquely strengthens, enhances, and publicly legitimizes the bond between two people and their families in profound and enduring ways.

ARGUMENT

I. THE RIGHT TO MARRY IS FUNDAMENTAL FOR ALL AMERICANS.

The "freedom of personal choice in matters of marriage" is a fundamental constitutional right and a basic civil right. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (1974). In more than a dozen cases over the last century, this Court has reaffirmed that the right to marry is "one of the liberties protected by the Due Process Clause," *id.*; "essential to the orderly pursuit of happiness by free men," *Loving v. Virginia*, 388 U.S. 1, 12 (1967); and "sheltered by the Fourteenth Amendment against the State's

unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996).[2]

The right to marry has always been based on, and defined by, the constitutional liberty to select the partner of one's choice—not on the partner chosen. The Court has defined marriage as a right of liberty, *Zablocki*, 434 U.S. at 384, privacy, *Griswold*, 381 U.S. at 486, intimate choice, *Lawrence*, 539 U.S. at 574, and association, *M.L.B.*, 519 U.S. at 116. "Marriage is a coming together for better or for worse, hopefully enduring, and intimate *to the degree of being sacred*." *Griswold*, 381 U.S. at 486 (emphasis added). The right "is of fundamental importance *for all individuals*." *Zablocki*, 434 U.S. at 384 (emphasis added). Thus, the recognition that gay and lesbian individuals are free to marry the partner of their choosing would not compel the Court to recognize a new fundamental right—it simply requires the Court's adherence to its long line of precedent holding, and repeatedly reaffirming, that marriage is a fundamental right.

---

[2] *See also Lawrence v. Texas*, 539 U.S. 558, 574 (2003); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992); *Turner v. Safley*, 482 U.S. 78, 95-96 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (plurality); *Roe v. Wade*, 410 U.S. 113, 152 (1973); *Boddie v. Connecticut*, 401 U.S. 371, 376, 383 (1971); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

Nor is this fundamental right predicated upon the ability to procreate. Rather, the Court has consistently and explicitly recognized that the right to marry extends to individuals *unable* to procreate with their spouse, *see Turner*, 482 U.S. at 95, and that married couples have a fundamental right *not* to procreate, *see Griswold*, 381 U.S. at 485. In *Zablocki*, the Court struck down a Wisconsin statute that barred residents with child-support obligations from marrying. 434 U.S. at 376–77. The Court distinguished between the right to marry and the separate rights of "procreation, childbirth, child rearing, and family relationships." *Id.* at 386; *see also Carey*, 431 U.S. at 685 (distinguishing between separate rights of "marriage" and "procreation"); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, *married or single*, to . . [decide] whether to bear or beget a child.") (emphasis altered).

Similarly, in *Turner*, the Court held that incarcerated prisoners—even those with no right to conjugal visits—have a fundamental right to marry because "[m]any important attributes of marriage remain after taking into account the limitations imposed by prison life . . [including the] expressions of emotional support and public commitment," the "exercise of religious faith," and the "expression of personal dedication," which "are an important and significant aspect of the marital relationship." 482 U.S. at 95–96. Indeed, *Turner* acknowledged procreation as only *one* among *many* goals of marriage. *Id.* at 96. It further recognized that, while many "inmate marriages are formed in the

expectation that they ultimately will be fully consummated," some are not. *Id.*

The Court's decisions in cases involving the rights of gay men and lesbians confirm that marriage is a fundamental right that protects the liberty of all individuals to choose a spouse. As the Court explained in *Lawrence*, "our laws and tradition afford constitutional protection to personal decisions relating to marriage . . . [and] family relationships," "the Constitution demands [respect] for the autonomy of the person in making these choices," and "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." 539 U.S. at 574.

In *Windsor*, the Court reaffirmed the importance of marriage for *all* people—heterosexuals, and gay men and lesbians, alike. Striking down Section 3 of the Defense of Marriage Act, the Court emphasized that marriage is a "far-reaching legal acknowledgement of the intimate relationship between two people," and reflects the State's determination that a couple is "worthy of dignity in the community." *Windsor*, 133 S. Ct. 2675, 2692 (2013).

In the wake of *Windsor*, every federal court of appeals to consider the issue, except the Sixth Circuit, has held that state bans on same-sex marriage violate the Constitution. *See Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014), *petitions for cert. filed*, No. 14-765 (Dec. 30, 2014), No. 14-788 (Jan. 2, 2015); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir.), *cert. denied*, 135 S. Ct. 316 (2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir.), *cert. denied*, 135 S. Ct. 286, 135

S. Ct. 308, 135 S. Ct. 314 (2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1223 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir.), *cert. denied*, 135 S. Ct. 271 (2014). The unconstitutionality of those discriminatory measures follows inexorably from the intersection of this Court's settled line of marriage jurisprudence and its more recent cases recognizing that gay men and lesbians are entitled to the same constitutional protections as all other Americans. In addition, as explained below, this conclusion is compelled by the factual record developed in the case *amici* litigated and won, *Perry v. Schwarzenegger*, which substantiates the destructive, pernicious, and stigmatizing effects that prohibitions on same-sex marriage invariably have for gay men and lesbians, their families, and their children.

II. THE *PERRY V. SCHWARZENEGGER* TRIAL RECORD CONFIRMS THAT GAY MEN AND LESBIANS SEEK ACCESS TO THE SAME FUNDAMENTAL RIGHT TO MARRY THAT THIS COURT HAS LONG RECOGNIZED.

The twelve-day trial in *Perry v. Schwarzenegger*—the constitutional challenge to California's prohibition on same-sex marriage—produced an extensive evidentiary record regarding the history, scope, and importance of the fundamental right to marry. That record conclusively established that gay men and lesbians

seek the *same* fundamental right to marry that this Court has recognized time and time again.[3]

In January 2010, the Northern District of California presided over twelve days of testimony regarding the constitutionality of Proposition 8, a ballot initiative that amended the California Constitution to prohibit marriage between individuals of the same sex. The plaintiffs presented eight fact witnesses, including the *Perry amici*, and nine expert witnesses who testified on subjects ranging from the history of marriage in the United States to the social stigmatization caused by same-sex marriage bans. *Perry*, 704 F Supp. 2d at 932. In contrast, the proponents of Proposition 8, who intervened to defend the measure, presented only two expert witnesses, who the court concluded, respectively, offered "inadmissible opinion testimony" and were entitled to "little weight." *Id.* at 946, 952.[4] Based on that extensive evidentiary

---

[3] The trial record in *DeBoer v. Snyder*, No. 14-571, provides additional substantiation for this point. Indeed, Professor Nancy Cott testified in both *Perry* and *DeBoer* regarding the history of marriage. *Amici* ask the Court to consider the trial record in *Perry* as a supplement to the record already before the Court in *DeBoer*.

[4] In addition, the district court found that the proponents' witnesses made multiple admissions supporting the plaintiffs' case. For example, proponents' expert David Blankenhorn admitted that "same-sex marriages and opposite-sex marriages would be identical across" the "six dimensions of marriage" described in a report produced by his own Institute for American Values. *Perry*, 704 F. Supp. 2d at 949–50. He also "noted that marriage would benefit same-sex couples and their children, would reduce discrimination against gays and

(Cont'd on next page)

record, the district court made 80 findings of fact regarding, among other things, the long-term benefits of marriage for gay men and lesbians and their families. *Id.* at 953–91. Some of the principal findings are summarized below.

Factual Findings Related To The Benefits Of Marriage For The Couple And The Effects Of Permitting Gay Men And Lesbians To Marry

The district court's findings of fact related to the benefits of marriage for heterosexual, and gay and lesbian, individuals include:

- ***"Marriage benefits both spouses by promoting physical and psychological health."*** *Perry*, 704 F Supp. 2d at 962. The court based this conclusion largely on the testimony of psychologist Letitia Anne Peplau, including that "married individuals fare better. They are physically healthier. They tend to live longer. They engage in fewer risky behaviors. They look better on measures of psychological well-being." *Id.*

(Cont'd from previous page)

lesbians and would be 'a victory for the worthy ideas of tolerance and inclusion.'" *Id.* at 934. And Blankenhorn agreed that, insofar as we are a nation founded on "equal human dignity we would be more American on the day we permitted same-sex marriage than we were the day before." *Id.* at 950 (internal quotation marks omitted). Since the trial, Blankenhorn has declared his public support for marriage equality. *See, e.g.*, David Blankenhorn, *How My View on Gay Marriage Changed*, N.Y. Times (June 22, 2012), http://www.nytimes.com/2012/06/23/opinion/how-my-view-on-gay-marriage-changed.html?hp.

- ***"Material benefits, legal protections and social support resulting from marriage can increase wealth and improve psychological well-being for married spouses."*** *Id.* at 963. This finding was supported by the testimony of economist Lee Badgett regarding the "numerous economic benefits" of marriage, as well as the "stronger statement of commitment" to the relationship and "greater validation and social acceptance of the relationship and more positive workplace outcomes." *Id.*

- ***"Same-sex couples receive the same tangible and intangible benefits from marriage that opposite-sex couples receive."*** *Id.* at 969. As Dr. Peplau testified, "if same-sex couples were permitted to marry . they also would enjoy the same benefits [from marriage]." *Id.* Furthermore, Dr. Peplau testified that married same-sex couples in Massachusetts—where marriage between individuals of the same sex has been permitted since 2004—reported "various benefits" from marriage, including "greater commitment to the relationship, more acceptance from extended family, less worry over legal problems, greater access to health benefits and benefits for their children." *Id.*

- ***"Permitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages."*** *Id.* at 972. Dr. Peplau testified that allowing same-sex couples to marry will have "no impact" on the stability of marriages. In fact, data from

Massachusetts demonstrated that marriage and divorce rates were "no different" in the years after same-sex marriage was allowed than in the years before. *Id.*

- ***"The availability of domestic partnership does not provide gays and lesbians with a status equivalent to marriage because the cultural meaning of marriage and its associated benefits are intentionally withheld from same-sex couples in domestic partnerships."*** *Id.* at 971. As Dr. Peplau testified, "[t]here is a significant symbolic disparity between marriage and domestic partnerships." *Id.* Psychologist Gregory Herek echoed that point, testifying that there is a "great deal of strong feeling and emotion" regarding "the difference between marriage and domestic partnerships." *Id.*

Factual Findings Related To The Benefits Of Marriage For Children And Society

The district court found that States have "many purposes in licensing and fostering marriage," including enhancing the well-being of children and society. *Perry*, 704 F. Supp. 2d at 961. The district court's findings in this respect include:

- ***The "tangible and intangible benefits of marriage flow to a married couple's children" and the "children of same-sex couples benefit when their parents can marry."*** *Id.* at 963, 973. This common-sense conclusion was based on testimony by Dr. Badgett and Dr. Peplau, as well as survey data from married same-sex couples in Massachusetts. *Id.*

at 973. In particular, the economic benefits of marriage inure to the children of same-sex couples when they are permitted to marry. *Id.*

- ***Marriage "[f]acilitat[es] governance and public order by organizing individuals into cohesive family units."*** Dr. Cott testified that States have an interest in "creat[ing] stable households in which the adults who reside there and are committed to one another by their own consents will support one another as well as their dependents." *Id.* at 961. The court found that this "limit[s] the public's liability to care for the vulnerable." *Id.*
- ***Marriage "[l]egitimat[es] children."*** *Id.* Dr. Cott further testified that "legitimating children" was "a very important function of marriage" and that marriage promotes "inheritance rights" and helps children receive "other benefits of their parents." *Id.*

Factual Findings Related to Changes in Marriage

The district court found that marriage has steadily evolved, and that many legal restrictions on the formation and dissolution of marriages have been shed over the years, even though they were once viewed as integral to society. Some of these findings include:

- ***"Many states, including California, had laws restricting the race of marital partners so that whites and non-whites could not marry each other."*** *Perry*, 704 F. Supp. 2d at 957. Dr. Cott testified that "[p]eople who supported

[racially restrictive marriage laws] saw these as very important definitional features of who could and should marry, and who could not and should not." *Id.*

- ***"Under coverture, a woman's legal and economic identity was subsumed by her husband's upon marriage. The husband was the legal head of household."*** *Id.* at 958. As Dr. Cott testified, coverture "was the marital bargain" whereby a wife would be supported by her husband and, in turn, was to "serve and obey him, and to lend to him all of her property, and also enable him to take all of her earnings." *Id.* The court noted that "[c]overture is no longer part of the marital bargain." *Id.*
- ***"The development of no-fault divorce laws made it simpler for spouses to end marriages and allowed spouses to define their own roles within a marriage."*** *Id.* at 959. The effect of this change, according to Dr. Cott, was to "underline the fact that marriage no longer requires specific performance of one marital role or another based on gender." *Id.*
- ***"Eliminating gender and race restrictions in marriage has not deprived the institution of marriage of its vitality."*** *Id.* at 960. Dr. Cott emphasized that these gender restrictions were "seen as absolutely essential to what marriage was" in the nineteenth century, but that the removal of the "essential characteristic" of gender inequality in marriage resulted in "no apparent damage to the institution . . [I]n fact, I think [it was] to the benefit of the institution." *Id.*

Many people similarly "worried that the institution of marriage would be degraded and devalued" when racial restrictions on marriage were abolished, *id.* at 961, but when this Court "invalidated race restrictions in *Loving*, the definition of the right to marry did not change." *Id.* at 992.

- ***States have "never required that individuals entering a marriage be willing or able to procreate."*** *Id.* at 956. Dr. Cott testified that couples have never been required to "produce children" to marry and that "people beyond procreative age have always been allowed to marry." *Id.* at 957.

Lower courts around the country have relied upon the *Perry* trial record in recognizing the right of gay men and lesbians to marry. *See, e.g.*, *Latta*, 771 F.3d at 470; *Bishop v. United States ex rel. Holder*, 962 F Supp. 2d 1252, 1286 (N.D. Okla. 2014); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 478 (E.D. Va. 2014); *De Leon v. Perry*, 975 F. Supp. 2d 632, 651–52 (W.D. Tex. 2014); *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128, 1144–45 (D. Or. 2014); *Wolf v. Walker*, 986 F. Supp. 2d 982, 1005–06 (W.D. Wis. 2014). Those findings leave no doubt that eradicating those marriage laws that continue to discriminate against gay men and lesbians would strengthen the institution of marriage, and confer a sweeping array of tangible and intangible benefits on gay men and lesbians, their children, and society as a whole.

III. MARRIAGE IS DIFFERENT: PERSPECTIVES FROM THE *PERRY* AND *BOSTIC* PLAINTIFFS

Amici, like many adult Americans, are in committed relationships with the person they love. But unlike most Americans, they were prohibited for many years from solemnizing that commitment through civil marriage. Federal court decisions finally allowed *amici* to express their love and commitment for each other through marriage and removed the stigma with which their relationships had previously been branded. Securing the right to marry has had profound effects on their relationships, their families, and the way in which they view themselves and their futures.

Kris Perry and Sandy Stier, in a committed relationship for 15 years, were finally able to wed in June 2013, after this Court left intact the federal district court's decision in *Perry*. Paul Katami and Jeff Zarrillo were married that same day, 12 years after their relationship began.

The couples who challenged Virginia's ban on same-sex marriage share the same longevity of relationship and long-thwarted desire to marry as the *Perry* plaintiffs. Carol Schall and Mary Townley have been together for 30 years. In 1998, despite lacking the legal protections provided by marriage, they nonetheless committed to having a child together. Ten years later, they were married in California, and their marriage was finally recognized by Virginia following their successful legal challenge to the Commonwealth's ban on same-sex marriage in

2014.[5] Timothy Bostic and Tony London have been together for 26 years. On July 1, 2013, Tim and Tony applied for a Virginia marriage license from the Norfolk Circuit Court Clerk. Their request was denied. On October 6, 2014, they were finally married after this Court denied review of the Fourth Circuit's decision striking down Virginia's ban on same-sex marriage.

Amici have experienced both what it is like to be denied the fundamental right to marry, and more recently, full equality. Their experiences confirm that allowing same-sex couples to marry benefits the couples, their families, and society as a whole.

A. The Impact of Marriage on Family and Community

1. Kris and Sandy were the first couple to legally wed in California after this Court's ruling in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). Kris had always wished for the day "when we would be married and we would be equal." According to Kris, she and Sandy "felt an incredible sense of relief to be at the end of that long journey, and enormously proud to be the first couple to be wed in California along with Paul and Jeff." Now that they are married, Sandy explains, "[w]e have settled into a long-term partnership that's a little bit different somehow. We started to really look at our future as

---

[5] Schall and Townley married in California in 2008 following the California Supreme Court's decision in the *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), which held that the California Constitution protected the right of gay men and lesbians to marry, and prior to the passage of Proposition 8.

a married couple as though we can really rely on each other for the long haul. We have more solidarity as a couple and a family. The legitimacy that marriage has brought really changes both your emotional states and the practical ways you deal with the world in a very, very real way." Although Kris has been committed to Sandy since 1997, Kris reports that being married makes her feel she is now "all in," a sentiment no doubt familiar to anyone who has ever been married.

This feeling of being a cohesive unit also extends to the four sons Kris and Sandy have raised together. When Kris and Sandy met, they both had children from prior relationships and were eager to combine their families. Before marriage, it was difficult to communicate the nature of their relationship to their children's teachers and other members of their community. But now, says Kris, "all I have to say is that Sandy is my wife, and people get it." Their sons also felt a deep sense of relief once their parents' relationship was formally recognized. The fight for marriage equality and the uncertainty that surrounded it "took a lot of emotional space and energy." Kris, Sandy, and their sons do not regret that fight, but fervently "hope no other family has to go through the fight or that uncertainty ever again."

Shortly after they wed, Sandy and Kris went through another milestone together—dropping a child off at college. This paradigmatic family experience confirmed that marriage really was different. Kris recalls:

> We were treated like any other family. And it wasn't always like that. There's a lot of

> unspoken interaction where I felt before perhaps like there's no explaining this. And now there's an easy way to explain this. We're both parents and both wearing wedding rings and we're behaving like a married couple. It doesn't take people very long to get it. And that's good in the midst of a hard experience, like dropping your kid off at college.

This sense of security, however, is incomplete because Kris and Sandy fear that if they were to move to, or visit, a State that does not recognize their marriage, "we could be stripped of our marriage rights." This sense of trepidation will only be alleviated once "our fundamental right to be married travels with us wherever we may choose to go in this country."

2. Like Sandy and Kris, Paul and Jeff exchanged vows after Proposition 8 fell. Paul recalls, "We had been waiting for a while to get the license, and by the time the clerk finally gave us our license, the office was crowded with people. Jeff and I kissed and everyone started clapping. I was physically shaking. It is a moment I will never forget." It felt like a "crushing weight was lifted off of our chests and all of a sudden we could breathe freely again." Years of "unconscious compromise" evaporated when Paul and Jeff were able to say those long-overdue words to one another: "I do."

Marriage is more than the certificate that the county clerk issued to Paul and Jeff, as they discovered when they subsequently held a more formal wedding ceremony. They had been married

for a year, but finally decided to celebrate their commitment in front of their friends and families in that time-honored tradition of a wedding. Paul and Jeff each danced with his mother in a common wedding tradition, engaging in the "rite of passage that so many sons have had with their mothers over the generations." This dance was for Paul and Jeff "the most memorable dance we will ever have in our lives." Their marriage also means a great deal to their six nieces and nephews who asked questions as they got older and felt confused over why their uncles could not marry. Being married deepens Paul and Jeff's relationship not only with each other, but also with their families.

As many other married couples do, Paul and Jeff plan to start a family together now that they have proclaimed their commitment publicly and enjoy the legal protections and certainty that comes with marriage. They believe that having a legally recognized family unit is essential to providing a safe environment for children. Moreover, they believe it is important that children have the emotional and psychological stability of knowing that their parents are married and of not having to explain why their family is not legally recognized.

3. When *amici* Carol and Mary were finally able to secure recognition of their marriage in Virginia, they expressed feelings similar to those of Paul and Jeff. They note, "There is something personally spiritual about standing before all of the people you love and having them acknowledge, witness, and publicly support your relationship, and you can't do that if can't get married in your home state."

The State's legal backing "binds" Carol and Mary closer together. They are in the process of changing their last name to "Schall-Townley, fully embracing the legal recognition of our family." That legal recognition also includes Carol's ability to formally adopt the couple's daughter. Because Mary carried the child, under Virginia law, Carol was a legal stranger to their daughter, despite the fact that her daughter was and is "the most important thing" in Carol's life. Both Carol and Mary provide for their daughter financially, and both "participate in the details of her life: we pack her lunches, make sure she does her homework, and drive her to activities. We are both committed to making sure that our daughter has a safe and loving home in which to grow." Before marriage, Carol notes, "If Mary had passed away, I would have had no parental rights with respect to our daughter. In the eyes of the law, our family is now legitimate, and our daughter has the legal protection of having two parents."

Just as Kris and Sandy's sons were relieved when their parents were legally wed, Carol and Mary's daughter "was visibly moved to tears." Mary recalls having a conversation with their daughter before agreeing to challenge Virginia's ban as plaintiffs in the *Bostic* case. Their daughter explained that "it hurts to know that there are people out in the world that consider my family less worthy just because of my parents' sexual orientation." During the court proceedings, Carol remembered talking to her daughter about the other side's argument. Their daughter was disturbed that "the other side's lawyers said that parents like my moms make bad parents for their kids." After the

ruling in the Fourth Circuit, Mary remembers "celebrating with our daughter and feeling vindicated that the court was telling my daughter that she was right, and her moms were not bad parents. The court was agreeing that Carol and I are the great parents that our daughter knows we are." Now, "our home feels warmer—it's like we are wrapped in a blanket of the dignity of marriage." This "was the culmination and completion of the greatest hope of our lives."

But without full marriage equality across the United States, Mary and Carol still live in fear of what might happen if they cross into a State where their marriage is not recognized. Mary and Carol have had "to think long and hard about what will happen if our daughter decides to go to college in a State where our marriage is not recognized." Mary and Carol worry that Mary will again be viewed as their daughter's only parent, effectively making Carol and her own daughter legal strangers under the law. In Virginia, Mary and Carol "feel secure, but we don't know what would happen if we were visiting our daughter in a State that did not recognize our marriage and one of us ended up in the hospital, would our family be recognized, or would we again be treated as strangers?"

4. Similarly, even though Tim and Tony never imagined they would end their relationship, being married "makes it feel more binding." Tim and Tony are thrilled to be able to take full legal responsibility for each other for the rest of their lives. As Tim says, once two people commit themselves to each other, "you find a way to live with the negatives because

you're stuck with them. It just seems easier. It's codified. Psychologically, legally, publicly."

Tim and Tony always wanted children, but equality came too late for them. Eighteen years ago Tim and Tony put money aside to adopt or have a surrogate carry their child. They found a woman who agreed to be their surrogate, and they contacted an attorney to work out the legal framework. To their surprise, Tim and Tony found out from their attorney that they could not both be the child's guardians or parents and that their family would have to exist in an uncertain legal limbo. They ultimately decided not to have children because they did not feel comfortable starting a family without the legal security of marriage.

Although marriage equality came too late for Tim and Tony to have children together, it brought them closer to another kind of family—their faith community. As men of deep religious conviction, being able to plan a ceremony in their church that carries with it the force of law has been tremendously important for them. Before oral argument at the Fourth Circuit in *Bostic*, Tim had lunch with the rector of his church, and the rector asked him about where he and Tony would get married if the case was successful. When Tim said he had not considered the question, the rector responded that "he would be offended if [Tim and Tony's] wedding did not take place at the church." This May, Tim and Tony will reaffirm their vows in their church of thirteen years in front of their friends, family, and congregation, in a ceremony that holds deep significance for both men.

B. The Legal Impact of Marriage Through Everyday Benefits and Burdens

Through marriage equality, *amici* are finally experiencing the legal protection that most Americans take for granted, as well as the attendant responsibilities.

When Mary was pregnant with the couple's daughter, she experienced complications and had to be rushed to the hospital. Watching a loved one being rushed to the hospital—a trying situation under any circumstances—inspires even greater fear when you lack legal recognition for your relationship because you have no right to know how your loved one and the child she is carrying are doing. The hospital, following state law at the time, refused to give Carol information about Mary's condition and treated her as though she "didn't exist." Carol remembers walking by that same hospital two weeks after her marriage was recognized in Virginia and realizing that if the same thing were to "happen today, I would be able to say 'I am her wife.' The fact that we are a family would be respected and honored and that makes all the difference in the world."

Before marriage equality, same-sex couples were also subject to a thicket of federal and state tax laws that treated same-sex couples differently. Now that they are married and this Court has struck down Section 3 of the Defense of Marriage Act, *amici* can file jointly at both the state and federal level. Last year was the first time Paul and Jeff were able to file state and federal taxes jointly. Perhaps with a bit of irony, they note that they were "thrilled" to have

"equal access to the marriage penalty like everyone else."

Because of the well-developed legal doctrines regulating marriage, *amici* are also saved the time and expense that came with hiring attorneys to help them navigate the intricacies of domestic partnership laws. For many years, Sandy and Kris were burdened with having to draft "co-ownership agreements" and engage in "elaborate estate planning." Epitomizing the ease with which the law treats married couples, Sandy and Kris just bought a new home and went through a process that was "just easier" than it was before.

Benefits governed by marital status are also now accessible to the couples. Carol and Mary say that they can now include each other on their health insurance, and once the adoption is finalized, Carol will also be able to officially include their daughter as a family member on her insurance.

As a disabled veteran, Tony has also experienced marriage as conferring tangible benefits on the couple. Before Tim and Tony were married, if something happened to Tony, the financial impact would have been complicated to untangle. Now "[o]ur attorney said he would re-do our documents as a wedding gift. But instead of a full binder, he said it would be just a folder with three pages." Such simplicity and certainty is the direct result of this Court's decision in *Windsor*, which granted same-sex couples marriage recognition at the federal level, and the Fourth Circuit's decision in *Bostic*, which granted Tim and Tony marriage equality at the state level. In short, Tim and Tony are no longer relegated to the

"unstable position of being in a second-tier" relationship. *Windsor*, 133 S. Ct. at 2694.

* * *

As married couples, *amici* have experienced the public commitment, private security, intimate companionship, and legal protections previously denied to them. This Court has consistently recognized that these virtues of marriage are essential to the proper functioning of society, and *amici*'s experiences demonstrate the wisdom of that position.

It is deeply troubling to *amici* that these rights continue to be withheld from other same-sex couples, and that they themselves could potentially have these rights taken away or be forced to navigate a patchwork of rights and obligations that vary from State to State. They seek to live in a country where all gay men and lesbians are constitutionally guaranteed the right to marry and are able to access the same dignity, status, and responsibilities that *amici* have enjoyed since securing the freedom to marry. To preserve those benefits for *amici* and their families—and extend them to countless other gay men and lesbians across the United States—the Court should affirm, consistent with over one hundred years of precedent, that marriage is a fundamental right of all people in every State across this Nation.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the court of appeals.

Respectfully submitted.

DAVID BOIES
JOSHUA I. SCHILLER
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, NY 10504
(914) 749-8200

THEODORE J. BOUTROUS, JR.
THEANE EVANGELIS
ENRIQUE A. MONAGAS
ABBEY HUDSON
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7726

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
AMIR C. TAYRANI
CHANTALE FIEBIG
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
tolson@gibsondunn.com

THOMAS B. SHUTTLEWORTH
ROBERT E. RULOFF
CHARLES B. LUSTIG
ANDREW M. HENDRICK
ERIK C. PORCARO
SHUTTLEWORTH, RULOFF, SWAIN,
HADDAD & MOREOCK, P.C.
317 30th Street
Virginia Beach, VA 23451
(757) 671-6000

Counsel for Amici Curiae

March 6, 2015